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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 607

PAUL A. PIGOTT, EUGENE E. MURPHY, WILLIAM F. MENARD, FRANK R. McNABB, VINCENT W. BAUMIA, ERNEST E. LAMB, HAROLD HATCHER, JR., THOMAS R. HALL, PAUL EVANS, HENRY J. BARROW, AND MILTON E. STONE,

Petitioners,

vs.

DETROIT TOLEDO & IRONTON RAILROAD COMPANY, A CORPORATION, AND BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO [illegible]56

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners—Paul A. Pigott, Eugene E. Murphy, William F. Menard, Frank R. McNabb, Vincent W. Baumia, Ernest E. Lamb, Harold Hatcher, Jr., Thomas R. Hall, Paul Evans, Henry J. Barrow, Milton E. Stone, individually and on behalf of all other members of the United Railroad Operating Crafts, a railway labor organization, similarly situated—respectfully pray that a writ of cer-

tiorari issue to review the judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, prior to judgment in the Court of Appeals for the Sixth Circuit where said cause is pending on appeal as No. 12,143.

The District Court ruled that it did not have jurisdiction of the subject matter and therefore dismissed the complaint.

Inasmuch as other aspects of the basic jurisdictional question presented by the District Court's ruling are now before this Court in three other petitions, Nos. 472, 513, and 548, petitioners seek review in this cause prior to judgment in the Court of Appeals.

OPINION BELOW.

The opinion of the District Court, dated November 10, 1953 (R. 61a-75a), is reported at 116 F. Supp. 949.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED.

The District Court's ruling that it did not have jurisdiction of the subject matter raises issues closely related to the jurisdictional questions posed in petitions No. 472, 513, and 548 now pending in this Court. In view of the circumstance that in this case—as contrasted to the others—*the individual petitioners sought court relief after hearings before the appropriate administrative agency, a System Board of Adjustment,* the questions presented may be stated as follows:

1. Does a district court of the United States have jurisdiction, in a case brought before it under Section 1337 of Title 28 of the U. S. Code, among others, to decide whether or not a given railway labor organization is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act and a union shop agreement entered into pursuant thereto, after a System Board of Adjustment has determined that the organization is not "national in scope", or has the Railway Labor Act deprived the court of jurisdiction even by way of review of the System Board's decision?

2. Is Section 3 First (f) of the Act, which provides machinery for determining whether an organization is qualified to participate in choosing labor members of the National Railroad Adjustment Board when that organization's claim to participate is disputed, applicable to the determination of whether a railway labor organization—which has made no claim to participate in the selection of Board members—is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act?

3. Is the issue of whether a given railway labor organization is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act a question of statutory interpretation for the courts or a dispute involving the interpretation or application of an "agreement" concerning "working conditions" as those terms are used in Section 3 First (i) of the Railway Labor Act, over which dispute a System Board of Adjustment has exclusive jurisdiction?

4. Does not an interpretation of the Railway Labor Act, and in particular of the Union Shop Amendment thereto, requiring a railway labor organization, whose status as an organization "national in scope" is disputed and whose

members are therefore claimed to be not in compliance with a union shop agreement, to seek to establish its status as "national in scope" through the procedures prescribed by Section 3 First (f) deprive such organization and its members of the due process of law guaranteed by the Fifth Amendment and involve an unconstitutional delegation of legislative and judicial powers in violation of Section 1 of Article I and Section 1 of Article III of the United States Constitution?

5. Does not an interpretation of the Railway Labor Act, and in particular of the Union Shop Amendment thereto and Sections 3 First (m) and (p), making final and binding and not subject to any kind of review a determination by a System Board of Adjustment that railroad employees are not in compliance with a union shop agreement since the union to which they belong is not "national in scope", deprive such employees of the due process of law guaranteed by the Fifth Amendment to the United States Constitution?

6. Is it not a denial of the due process of law guaranteed by the Fifth Amendment to the United States Constitution for a System Board of Adjustment, consisting of one carrier representative and one representative of the collective bargaining agent, to pass upon the compliance or non-compliance of employees with the union shop agreement where that question turns upon whether the organization to which the employees belong is "national in scope"?

7. Does not an interpretation of the Railway Labor Act, holding that individual employees may not seek judicial relief declaring that the System Board of Adjustment is disqualified to determine whether the employees have complied with a union shop agreement because of the conflict of interest between the employees and the labor organiza-

tion holding the union shop agreement unless the organization to which the employees belong has first qualified as "national in scope" in accordance with the procedures of Section 3 First (f), deny such employees the due process of law guaranteed by the Fifth Amendment to the Constitution?

STATUTES INVOLVED.

Title 28, U. S. C., Section 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Title 45, U. S. C., Sections 152 and 153 (the Railway Labor Act, Sections 2 and 3):

The Union Shop Amendment to the Railway Labor Act, Public Law 914, 81st Congress, appears as Section 152 Eleventh of the Act.

STATEMENT.

This case, like Nos. 472, 513, and 548, arises by reason of the fact that railroad employees, here of the Detroit Toledo & Ironton Railroad Company, have been claimed not to have complied with a union shop agreement between the railroad and the collective bargaining representative, in this instance the Brotherhood of Railroad Trainmen. Specifically, it was asserted that the employees had failed to comply inasmuch as the organization to which they belonged, the United Railroad Operating Crafts, was not "national in scope."

On May 26, 1952, the Detroit Toledo & Ironton Railroad Company and the Brotherhood of Railroad Trainmen (BRT) entered into a union shop agreement, effective June 1, 1952, with respect to the employees represented by the BRT. (Exhibit A attached to the Amended Complaint, R. 49a-53a.) The agreement provided that employees in the crafts and classes involved must, as a condition of continued employment, become and remain members of the BRT "within sixty (60) calendar days of the date they first perform compensated service as such employes after the effective date of this agreement * * *." (R. 49a.) As required by subsection (c) of the Union Shop Amendment to the Railway Labor Act, Section 2 Eleventh, the agreement provided further that the requirement of membership in the BRT was not applicable to "employes * * * who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employes of a craft or class in engine, train, yard or hostling service * * *." (R. 49a.)

The individual petitioners are employees of the Detroit Toledo & Ironton Railroad Company. Prior to May 26, 1952 they were members of the BRT, but thereafter they changed their union membership from the BRT to the United Railroad Operating Crafts (UROC). (R. 38a.)

During the months of August and September, 1952, the BRT initiated proceedings against the individual petitioners, advising the railroad that petitioners were not in compliance with the union shop agreement. The railroad thereupon notified the petitioners that they had been cited by the BRT for non-compliance and advised them that under the union shop agreement they could ask for hearings before the System Board of Adjustment. (Exhibits B and C attached to the Amended Complaint, R. 54a-57a.) Section 7 of the agreement established a Board of Adjustment "for the sole purpose of handling and disposing of disputes arising under this agreement." The Board was to consist of two members, "one to be appointed by the Carrier and one by the Brotherhood." The hearing to be held "shall be confined exclusively to the question of the employe's compliance with the provisions" of the agreement. "The employee will be required at this hearing, to furnish substantial proof of his compliance with the provisions of this agreement," and "the decision of the Board of Adjustment shall be by majority vote and shall be final and binding." (Exhibit A attached to the Amended Complaint, R. 52a.)

The Board appointed pursuant to this agreement consisted of Mr. U. D. Hartman, Chairman of the BRT General Grievance Committee on the carrier, and the Secretary of the Detroit Toledo & Ironton Railroad. (R. 40a.) Mr. Hartman was one of the signers of the union shop agreement on behalf of the BRT, and he also wrote the letters to the railroad advising it of the non-compliance of the individual petitioners and requesting their discharge. (Ex-

hibits A and B attached to the Amended Complaint, R. 53a-55a.)

The petitioners requested hearings before the System Board, and hearings were held in September of 1952. (R. 40a.) On September 12, 1952 the petitioners were notified that the "Board has rendered its unanimous decision that you have not complied with terms of said Union Shop Agreement," and that their employment would terminate ten days thereafter. (R. 58a.)

The petitioners filed suit on September 18, 1952 in the United States District Court for the Eastern District of Michigan, Southern Division, to enjoin their discharge. (R. 1a, 4a-9a.) An order to show cause was entered that day enjoining discharge prior to hearing. (R. 10a-11a.) The BRT was permitted to intervene as a party defendant on the basis of its motion asserting, among other things, that the applicant, the BRT, "is the real party in interest in this action * * *." (R. 13a, 20a.) The railroad filed an answer (R. 14a-18a), and the BRT presented a motion to dismiss. (R. 23a-28a.) On January 21, 1953, the individual petitioners were permitted to file an amended complaint. (R. 36a-58a.)

THE PLEADINGS.

The Amended Complaint, after detailing the essential facts concerning the union shop agreement, the citations for non-compliance, the hearings, and the orders of discharge, alleged that the United Railroad Operating Crafts was a railway labor organization "national in scope" organized in accordance with the Railway Labor Act. (R. 38a-39a.) It also alleged that the union shop agreement between the railroad and the BRT was in conflict with the Railway Labor Act and therefore invalid for the following reasons, among others: (1) the Union Shop Amendment

does not provide for setting up a System Board of Adjustment in a union shop agreement for the purpose of determining complaints initiated by the union against an employee; (2) Section 3 Second of the Railway Labor Act authorizes system boards only for the purpose of hearing disputes between employee and carrier and not disputes between the bargaining representative and the employee; (3) the agreement permits the representative of the BRT to sit in judgment on the BRT's complaint against the employee; (4) the agreement attempts to make the decision of the board final without any right to appeal or review. (R. 41a-43a.)

The Amended Complaint further alleged that the System Board was without authority to define the meaning of the statutory language "national in scope" and to determine that UROC was not "national in scope"; that the hearing before the System Board and its decision were "arbitrary and illegal and in violation of the Act * * * based on a request of the Brotherhood to discharge the Plaintiffs * * * initiated by said Brotherhood for the purpose of discriminating against the Plaintiffs because they had joined United Railroad Operating Crafts, a rival labor organization * * *" (R. 43a-44a); that the BRT "was remiss in its duties as Agent of the Plaintiffs and those other minorities as well as in their statutory duty under the Act, to protect the rights of the Plaintiffs and other minority groups of employees of the same craft or class, to represent them fairly, without discrimination, to refrain from restricting their unequivocal rights as employees to join labor organizations National in Scope of their own choosing * * *" (R. 44a); and that if the discharges were carried out the petitioners would suffer irreparable damage and their statutory and constitutional rights to their jobs and property would be violated and destroyed. (R. 45a.)

The Amended Complaint asked for a declaratory judgment determining that UROC is a railway labor organization "national in scope" organized in accordance with the provisions of the Railway Labor Act and admitting to membership employees in the operating crafts, and that the carrier could not legally discharge the petitioners because of their membership in UROC; for a decree holding that the union shop agreement between the carrier and the BRT is unenforceable or inoperative at least as to the petitioners and others maintaining membership in UROC; and for a ruling that "the proceedings by the Defendants and the hearings had before said so-called System Board of Adjustment were irregular, arbitrary, against public policy, and its findings unenforceable". (R. 46a.)

The Answer of the railroad asserted, among other defenses, that "the Complaint fails to state a claim against defendant upon which relief can be granted," and that "the Railway Labor Act * * * applies and the decision of the Adjustment Board pursuant to Section 3, Second of said Act is final and the jurisdiction of said Board is exclusive". (R. 17a.)

The Motion to Dismiss filed by the BRT stated, among other things, that (1) "The action involved is a dispute between employees and the defendant carrier growing out of grievances or out of interpretation or application of an agreement concerning rules or working conditions, and respects the employment status of the said employees, the plaintiffs herein * * *. (2) The dispute and the parties are subject to the exclusive jurisdiction of the administrative tribunals provided by the Railway Labor Act * * *. (3) The remedies accorded in the said Act are exclusive and the dispute, controversy and issues herein concerned are nonjusticiable * * *. (4) The decision of the Board, by virtue of the said agreement and the authority of the Railway Labor Act, is final and binding". (R. 23a-24a.)

THE DISTRICT COURT'S DECISION.

On November 10, 1953 Judge Theodore Levin entered an order granting the motion of the BRT to dismiss, dismissing the complaint, and vacating the temporary restraining order previously issued. (R. 76a.) In his opinion Judge Levin held that the conflict of interest between the established unions and the new union rendered the National Railroad Adjustment Board incompetent to review the "national in scope" qualifications of the new organization; for the same reason a System Board was not competent. Therefore, in line with the intent of Congress to provide an administrative procedure for determining whether or not an organization was "national in scope," the Secretary of Labor and the three-man board provided by Section 3 First (f) must be held to have exclusive jurisdiction to make such a determination, not only for the purpose of deciding if an organization may participate in selecting labor members of the Adjustment Board, but also for the purpose of qualifying an organization as "national in scope" for purposes of union shop agreements. Since the Secretary of Labor and the three-man board can act only if there is a dispute as to the claim of the organization to participate in selecting labor members of the Board, the new labor organization "must exert itself, at least to the extent of participation in the adjustment board machinery * * *" before it is "entitled to enlist employees on the basis of the privileged standing accorded to qualified unions in Section 152, Eleventh * * *". Once an organization is determined to be "national in scope" in accordance with the procedures of Section 3 First (f), "the adjustment board must abide by the determination of such status * * *". (R. 69a-72a.)

Since UROC was not participating in the National Railroad Adjustment Board machinery, "there was no

alternative but for the system board to find that UROC was not national in scope and was not organized in accordance with the Act." The determination of the adjustment board is final and binding and not subject to judicial review.

Furthermore, the court ruled not only that it was without jurisdiction to decide whether UROC is national in scope but also that "there is an absence of jurisdiction to decide whether the agreement between the Brotherhood and the Railroad is 'unenforceable or inoperative' as to the plaintiffs." (R. 71a-72a.) This is so because the union shop agreement "concerns a rule or working condition," and a dispute relative to an employee's non-compliance "is a dispute between an employee and a carrier involving the interpretation and application of an agreement concerning a rule or working condition. The hearing of such a dispute, therefore, is within the exclusive province of the adjustment board." (R. 72a.)

Finally, the court ruled that the employees did not have standing to request a declaration that the System Board was disqualified to act because of a conflict of interest between the BRT and the employees, inasmuch as "their complaint must allege a controversy, ripe for adjudication, in which it appears that such a holding is indispensable to the protection of their legal rights. Under the Act, plaintiffs are not entitled to their seniority or their employment unless they belong either to the Brotherhood or to another union which has qualified, pursuant to the procedure provided in Section 153, for the exception to the union shop requirement. Since the complaint fails to allege that UROC has so qualified, plaintiff's membership in that labor organization does not preserve any right, the protection of which justifies the intervention of this Court." (R. 74a-75a.)

SUBSEQUENT PROCEEDINGS IN THE DISTRICT COURT.

On November 13, 1953 petitioners served notice of a Motion for Reconsideration or for Relief under Rule 60(b) of the Federal Rules of Civil Procedure and for a Stay under Rule 62(b). In that motion, petitioners urged either that the court reconsider its opinion and order in the light of the constitutional arguments advanced in the motion, or in the alternative that it set aside its order at least to the extent necessary to permit petitioners to file an amendment to their amended complaint. The amendment petitioners asked to file was entitled "Count II: For Declaratory and Injunctive Relief and for Convening Three-Judge Court", and it alleged that the Union Shop Amendment to the Railway Labor Act was unconstitutional for the reason, among others, that the rights of individual employees were made to depend upon a phrase, "national in scope", which is so vague that reasonably intelligent men, in attempting to make the decisions which the Act and agreements pursuant to it require them to make if they desire to continue their employment, can only guess at its meaning. (R. 89a-106a.)

In urging reconsideration of the court's opinion, petitioners contended that the court's interpretation of the Railway Labor Act rendered it, and particularly the Union Shop Amendment, unconstitutional insofar as it provided for a delegation of judicial or quasi-judicial powers to the Secretary of Labor and then to an essentially private three-man board in the absence of "reasonably definite standards and criteria" according to which such agencies might decide the cases coming before them, and in the absence of any statutory or other rules requiring either the Secretary of Labor or the three-man board to adhere, in their procedures, to the basic requirements of due process of law. Moreover, petitioners contended that "the three-man Board is not a governmental agency but a private agency, inas-

much as its members are composed of representatives selected by the claimant organization, the resisting organizations, and a neutral, appointed by the National Mediation Board." (R. 85a.) In fact, Judge Levin described this procedure as follows: "The unique character of these boards, in which the adverse parties are equally represented, gives their proceedings more of the quality of a conciliation conference than a quasi-judicial tribunal. For this reason, they are intended to be self-regulating both as to substantive and procedural matters. This informal technique of resolving employer-employee conflicts which Congress has provided for the Railroad industry offers no basis for the application of principles of judicial review." (R. 73a-74a.)

Petitioners' motion was argued on November 23, 1953; it was denied on January 13, 1954. (R. 183a.) Petitioners filed their notice of appeal from the court's order of November 10, 1953 on December 9, 1953 and from the order denying reconsideration and leave to amend on January 14, 1954. (R. 182a, 185a.) On January 12, 1954, the Chief Judge of the Court of Appeals for the Sixth Circuit entered a temporary order restraining the discharge of the petitioners "for the period of one week and thereafter if the Court is hereafter satisfied that it has authority to restrain the discharge of the plaintiffs until after the decision of the within cause on appeal." (R. 188a.) On January 18, 1954 Chief Judge Simons denied petitioners' motion for a restraining order pending appeal and vacated the temporary order entered on January 12, 1954. (R. 189a.)

In consequence of these proceedings the railroad discharged nine of the petitioners and terminated their seniority rights.

The Transcript of Record was filed in the Court of Appeals for the Sixth Circuit on January 21, 1954, where it was docketed as cause No. 12,143.

REASONS FOR GRANTING THE WRIT.

I.

The Public Interest Will Be Promoted by the Prompt Determination by This Court of the Jurisdictional Issues Presented by the Petition.

As pointed out in the Petition for a Writ of Certiorari in *United Railroad Operating Crafts* v. *Wyer*, No. 472, filed in this Court on November 20, 1953, the question of whether the federal courts have jurisdiction to determine the "national in scope" character of a railway labor organization under a union shop agreement entered into pursuant to the Union Shop Amendment to the Railway Labor Act is of great importance in the administration of the Act. (Petition, No. 472, pp. 13-17.) It was there stated that the question had already arisen in a number of courts: this is one of the cases referred to. (Petition, No. 472, pp. 16 and 22.)

In view of petitioners' motion for reconsideration and for leave to amend, and the district court's denial of the motion, there are involved in petitioners' two appeals two questions: (1) the correctness of the district court's judgment dismissing the complaint and refusing to reconsider; (2) the correctness of the district court's refusal to permit petitioners to amend by adding Count II to their complaint alleging the unconstitutionality of the Union Shop Amendment. As appears from the "Questions Presented" section of this petition, *supra*, petitioners are raising only the matters covered under (1) above, namely, the correctness of the district court's judgment dismissing the complaint and refusing to reconsider. *They do not seek review by*

this petition of the district court's denial of leave to amend by adding Count II to the complaint.

Under these circumstances, therefore, petitioners will be arguing in the Court of Appeals for the Sixth Circuit both the jurisdictional issue and the question of denial of leave to amend. But the former is already being raised, although in somewhat different form, in three petitions now pending in this Court—Nos. 472, 513, and 548.

This case, on its facts, complements the others now pending. Here, as in the *Pennsylvania* case, No. 548, the union shop agreement provided for a System Board of Adjustment as the tribunal for resolving disputes arising under the agreement. But in contrast to the situation in the *Pennsylvania* case, *the petitioners here sought court relief only after having had hearings before the System Board of Adjustment.* As a result the present issues, while basically similar, go beyond the issues raised in the *Pennsylvania* and the other cases. For the basic problem becomes one of whether a railroad employee may be deprived of his job and his seniority for claimed non-compliance with a union shop agreement without any opportunity for a hearing of any kind except before a Board composed of one representative of the railroad and one representative of the collective bargaining representative which claims that the employee has not complied. In addition, the issue is posed directly as to whether, after going through the so-called "administrative" processes of the System Board, the employee is to be denied any kind of court review by reason of the "final and binding" language of the union shop agreement and the Railway Labor Act. Thus fundamental issues of due process of law arise under circumstances in which it cannot be asserted that the employee has not first resorted to the Adjustment Board.

In this sense, therefore, the whole question of the ade-

quacy of the Adjustment Board remedy is posed even more sharply here than in the other cases. It is submitted that this case would materially assist the Court in considering all the legal and constitutional questions posed by the basic problem of whether a court or some Railway Labor Act administrative tribunal has the power to determine whether a given labor organization is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act. The public interest will be served by having all these aspects of the problem before the Court at the same time.

Not the least of the advantages arising from considering this case along with Nos. 472, 513, and 548 is the fact that the Court will have before it, as part of the record (R. 107a-181a), the transcript of the hearing before the System Board of Adjustment. This transcript makes abundantly clear the partisan nature of the proceedings which resulted in petitioners' loss of jobs and seniority without—so the district court holds—recourse of any kind.

II.

The Further Reasons Urged for Granting the Writs in No. 472 (Petition, pp. 17-26) and No. 513 (Petition, pp. 7-9) Are All Applicable Here.

In view of the nature and tenor of the proceedings before the System Board of Adjustment (See, *e. g.*, R. 117a, 127a-128a, 173a-174a), it is submitted that this case raises squarely the question as to how, consistently with due process of law, a body such as the System Board can constitutionally be the sole tribunal, whose decision is final and binding and not subject to review of any kind, before which an employee is compelled to seek his remedy.

Furthermore, as a matter of administrative and consti-

tutional law, how can it be said that, before the individual employee can even assert that the proceedings before the System Board were arbitrary and lacking in due process by reason of the conflict in interest between the employee and the collective bargaining representative whose representative sat on the board, he first must allege that the organization to which he belongs has qualified under Section 3 First (f) as "national in scope"? Taken literally, this means that even though an individual party has exhausted *his* administrative remedy he cannot complain in court because the organization to which he belongs has not exhausted *its* remedy before an entirely different tribunal, and one, incidentally, to which the individual has no access whatsoever.

In view of these considerations, it is submitted that this case is one which requires more urgently than the others prompt review by this Court. Although petitioners are asking that review be had prior to judgment in the Court of Appeals, they believe that the public interest is sufficient to justify this step. As the Respondent Northern Pacific Railway Company has advised this Court in its Statement in No. 513, the jurisdictional issue is an important one in the "administration of the 1951 Union Shop Amendment of the Railway Labor Act * * * [and] should be settled by a decision of this Court."

CONCLUSION.

For the reasons outlined above, petitioners respectfully urge this Court to grant their petition along with the petitions filed in Nos. 472, 513, and 548.

Respectfully submitted,

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BRIEF FOR THE BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.....

PAUL A. PIGOTT, EUGENE E. MURPHY, WILLIAM F. MENARD, FRANK R. McNABB, VINCENT W. BAUMIA, ERNEST E. LAMB, HAROLD HATCHER, JR., THOMAS R. HALL, PAUL EVANS, HENRY J. BARROW, and MILTON E. STONE,
Petitioners,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

OPINION BELOW

Th opinion of the District Court, dated November 10, 1953, granting defendant's motion to dismiss for want of jurisdiction over the subject matter, is reported at 116 F. Supp. 949. (The cause is now pending on appeal in the Court of Appeals for the Sixth Circuit.)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1), 62 Stat. 928.

QUESTION PRESENTED

Does a United States District Court have jurisdiction, whether by review or originally, of the subject matter of a controversy respecting compliance by railroad employees with a union shop agreement, executed pursuant to the provisions of the Railroad Labor Act?

STATUTES INVOLVED

Title 28, U. S. C., Section 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Title 45, U. S. C., Section 152 and 153 (Railway Labor Act, Sections 2 and 3).

The Union Shop Amendment to the Railway Labor Act, as amended, which was enacted in 1951, appears as Section 152 Eleventh of the Act.

Section 153 Second authorizing the establishment of system boards of adjustment reads:

> "Nothing in this section shall be construed to prevent any individual carrier, system or group of carriers and any class or classes of its or their em-

ployees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come within the jurisdiction of the Adjustment Board."

Section 8, Norris-LaGuardia Act, 29 U. S. C. A., Section 108.

STATEMENT OF THE CASE

The statement of the case as presented by petitioners (Petition, pages 6-14) is substantially correct.

However, certain corrections and additions should be made. The System Board hearing herein, pursuant to which the discharge of the plaintiffs was ultimately had, was not precisely concerned with whether or not the United Railroad Operating Crafts was "national in scope." Nor did the plaintiffs' discharge turn on such a finding. The System Board ruled, rather, that the plaintiffs had not shown compliance with the union shop agreement in that (a) they acknowledged their non-membership in the Defendant Union, the certified bargaining agent, but (b) failed to present evidence establishing their membership in some other labor organization, national in scope and organized in accordance with the Railway Labor Act, whether United Railroad Operating Crafts or any other.

Following the ruling by the System Board, the plaintiffs commenced the instant action seeking, *inter alia*, injunc-

tive relief against the discharge of the plaintiffs by the defendant railroad. The Defendant Brotherhood moved to dismiss, for reason of the court's lack of jurisdiction over the subject matter. The Defendant Brotherhood asserted, in addition to those grounds set forth at page 10 of plaintiffs' petition, directed chiefly to the exclusive and final jurisdiction of administrative tribunals under the Railway Labor Act as to controversies arising thereunder, that * * * "The plaintiffs, before seeking injunctive relief have not made every reasonable effort to settle their dispute, either through negotiations or the full utilization of administrative or extra-judicial remedies, inclusive of presentation to the Board of Adjustment of substantial proof of compliance with the terms of the union shop agreement, contrary to the requirements of Section 8 of the Norris-LaGuardia Act, 29 U. S. C. A., Section 108"; and that "The plaintiff fails to state a claim upon which relief can be granted."

Thereafter, the District Court granted the motion to dismiss, and denied subsequent motions of the plaintiffs for reconsideration, or, alternatively, amendment and the impanelling of a three-judge court. The plaintiffs thereafter appealed to the Court of Appeals for the Sixth Circuit. Subsequent to the proceedings in the Court of Appeals set forth at page 14 of plaintiffs' petition, including the denial by the Chief Judge of a restraining order pending appeal and the vacation of a temporary order theretofore entered, the plaintiffs filed two motions with the Court of Appeals. The first was a "Motion for Extension of Time for Filing of Briefs Pending Disposition of [a then proposed, now the instant] Petition for Certiorari" under Rule 39 of the United States Supreme Court; and the second, a "Motion for Leave to Withdraw Transcript of Record for Printing" in conjunction with that proposed

petition. Following responsive pleadings and arguments by all parties, the Court of Appeals, in Order dated February 19, 1954, ruled: "* * * (3) The motion for leave to withdraw the transcript is denied; (4) The motion to extend the time for filing of the appellees' [sic] brief until 20 days after a final disposition by the United States Supreme Court on a proposed petition for certiorari is denied; (5) The time for the filing of the appellants' brief is extended from February 22, 1954 to March 15, 1954 * * *'.' (A motion by the Defendant Brotherhood to correct the record and restrict issues on appeal was postponed for consideration, by the same order, until the hearing on the merits. That motion seeks to strike from the record and from all consideration by the Court of Appeals the plaintiffs' motion for reconsideration and other relief, the denial by the District Court of that motion, and the plaintiffs' appeal from that order of denial. The Brotherhood alleges in its motion that the District Court's order denying the plaintiffs' motion was unnecessary and improper, and the appeal similarly improper and out of time.)

Notwithstanding the ruling of the Court of Appeals, denying plaintiffs' application to withdraw the transcript of record for printing in conjunction with the then proposed petition for certiorari, the instant petition was subsequently filed.

ARGUMENT

I.

COMPANION PETITIONS TO THE INSTANT PETITION FOR CERTIORARI WERE DENIED BY THIS COURT ON MARCH 15, 1954.

As asserted in petitioners' application, the instant petition is a companion to three others previously pending before this Court: *United Railroad Operating Crafts v. Wyer,* in the Second Circuit, Petition No. 472; *United Railroad Operating Crafts v. Northern Pacific Railway,* in the Ninth Circuit, Petition No. 513; and *United Railroad Operating Crafts v. The Pennsylvania Railroad Company,* in the Seventh Circuit, Petition No. 548. All of these companion petitions were denied by this Court on March 15, 1954. The considerations which led to the denial of those petitions are equally applicable here.

II.

THE PETITIONERS HAVE NOT COMPLIED IN PRESENTING THE INSTANT PETITION WITH THE REQUIREMENTS OF RULES 38 AND 39 OF THIS COURT'S RULES REQUIRING THE FILING OF A CERTIFIED TRANSCRIPT OF RECORD.

In this cause, petitioners are seking in the instant petition review of the decision of the United States District Court for the Eastern District of Michigan, Southern Division, that it was without jurisdiction of the subject matter. The Court of Appeals for the Sixth Circuit, to which petitioners have appealed, has this case docketed before it. It may be exected that the case will be heard shortly by the Court of Appeals, inasmuch as attempts by the petitioners, in effect, to stay proceedings in the Court of Appeals pending disposition of the instant motion by this Court, were denied.

Petitioners predicate their instant petition upon Rule 39. That Rule provides that "Proceedings to bring up to this Court on writ of certiorari a case pending in a circuit court of appeals or the United States Court of Appeals for the District of Columbia, before judgment is given in such court, should conform, as near as may be, to the provisions of Rule 38; and similar reasons for granting or refusing the application will be applied."

Rule 38, paragraph one, in turn requires that a petition for review by certiorari "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ if asked to be directed." Reference is made in Rule 38, 1, to Rule 38, 7, on printing the record. The latter paragraph requires that all initial printing of the record be had under the supervision of the Clerk of this Court, though "* * * where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there."

The petitioners have not remotely complied with these mandatory requirements.

First, no certified transcript of the record has been presented to the Clerk of this Court for filing or printing. Second, while the plaintiffs have themselves printed a document purporting to be a "transcript of record," as purportedly printed for use in the Court of Appeals, that document consists only of an uncertified, printed copy of the "Appendix to Brief of Plaintiffs-Appellants" in the Court of Appeals. Third, the very inclusion of approximately two-thirds of the material in the Appendix as the purported record before the Court of Appeals is itself one of the issues, on appeal, before that court! Finally, absolutely

none of the "proceedings of the court to which the writ is asked to be directed," i.e., the Court of Appeals of the Sixth Circuit, are to be found within the purported printed record, in unquestioned contravention of Rule 38.

That our foregoing conclusions are correct, and that the defects are incapable at this stage of being remedied, are best confirmed by the plaintiffs' own proceedings in the Court of Appeals. The plaintiffs did, on February 10, 1954, file with the Sixth Circuit a "Motion for Leave to Withdraw Transcript of Record for Printing." That motion was a companion motion to another seeking to defer the need for the filing of briefs in the Court of Appeals until ultimate disposition of the instant petition for certiorari under Rule 39, which the plaintiffs then contemplated filing. The motion was in entirety as follows:

> "Plaintiffs-appellants respectfully move this Court for an order authorizing the withdrawal from the Office of the Clerk of the Transcript of Record in this cause, filed on January 21, 1954, so as to permit counsel for plaintiffs-appellants to have printed the portions of the Transcript already designated in Appellants' *Notice Pursuant to Rule 21f of this Court of Parts of Record Appellant Proposes to Print.*
>
> "It is the intention of plaintiffs-appellants to file in the United States Supreme Court, at the earliest practicable time, a Petition for a Writ of Certiorari prior to judgment in this Court, as authorized by Rule 39 of the Rules of the Supreme Court. In conjunction with such Petition, Rule 38 of the Rules of the Supreme Court requires the filing of a certified copy and nine additional printed copies of the record.
>
> "In order to facilitate the prompt preparation and filing of such Petition and printed record, plaintiffs-appellants' counsel therefore are requesting

that the Transcript of Record on file in this Court be made available to them. As soon as printing is completed, the Transcript of Record will be returned by Registered Mail and a printed copy supplied to the Clerk of this Court in order that he may thereupon certify it to the United States Supreme Court."

On February 19, 1954, the motion was denied. In proceeding as they do, petitoners are acting in obvious conflict with the ruling and intent of the Court of Appeals. Moreover, in the light of that Court's ruling on their motion, together with the court's reserving for its later consideration and later determination the propriety of the inclusion in the record on appeal of such a substantial portion of the plaintiffs' appendix, the petitioners necessarily misrepresent the nature of the document they have caused to be printed and have here designated "transcript of record." Finally, of course, they act fully contrary to that which they have themselves acknoweldged to be minimum and necessary procedure in connection with this petition, under the rules of this Court.

Petitioners have clearly failed to comply with the essential requirements of Rule 38, paragraphs 1 and 7.

III.

THIS CAUSE DOES NOT SATISFY THE REQUIREMENTS OF RULE 39, RESPECTING DIRECT REVIEW BY THIS COURT OF A DISTRICT COURT DECISION, WHERE APPEAL IS PENDING BEFORE A COURT OF APPEALS.

This petition is extraordinary in that it seeks review of a District Court decision prior to judgment in the Court of Appeals, ostensibly pursuant to the provisions of Rule 39 of this Court.

While Rule 39 permits in certain cases the presentation of petitions for certiorari in cases pending in a

Court of Appeals before judgment in such a court, petitioners' application[1] certainly discloses no basis to support their bare conclusion that the public interest for prompt settlement prior to judgment of the Court of Appeals exceeds in this case in any way the public interest in the prompt settlement prior to judgment in a Court of Appeals of any other cases pending before such a court and involving federal legislation. Indeed, in this case, in the Sixth Circuit, and in *United Railroad Operating Crafts v. The Pennsylvania Railroad Company* (pending in the Seventh Circuit; certiorari just denied in this Court, No. 548), both Courts of Appeals, in denying the plaintiffs' motions in each case (in effect) to stay proceedings in the Courts of Appeals until the disposition of the respective applications for certiorari in each case, under Rule 39, before this court, quite apparently agreed with the respective defendants' contentions that Rule 39 may not properly here be invoked. For as we argued below, as did the defendant union similarly in the Seventh Circuit case, "Plaintiffs-Appellants' motion, however, discloses no basis upon which the granting of certiorari by the Supreme Court [under Rule 39] may reasonably be anticipated and therefore by its terms no basis upon which an extension of time to permit the implementation of such a petition may be granted." This Court, in denying the petition in No. 548, has obviously agreed.

It is obvious that the procedure under Rule 39 is not intended for use in any or every case. The Supreme Court has stated concerning its power to grant certiorari before judgment that "this is a power not ordinarily to be exercised." *The Three Friends,* 166 U. S. 1. Where

[1] While petitioners argue by reference to other petitions previously pending before this Court, we have not been served with copies of those petitions.

certiorari prior to judgment has been granted in the public interest questions of great importance requiring prompt settlement were involved such as the constitutionality of the "Gold Clause," *Norman v. Baltimore & Ohio R. Co.*, 55 S. Ct. 407; the constitutionality of the Railroad Retirement Act of 1934, *Railroad Retirement Board v. Alton Railroad Company*, 55 S. Ct. 758. See *Robertson* and *Kirkham*, Jurisdiction of the Supreme Court of the United States, by Richard F. Wolfson and Philip B. Kurland (1951) at pp. 235, 236. The petition of plaintiffs-appellants does not suggest an issue of emergency and public importance comparable to the issues involved in the above cited cases. Nor, the companion petitions having been denied, can any argument be made that all causes be heard together.

See also *United States v. Montgomery Ward and Company*, 324 U. S. 858, 65 S. Ct. 862, 89 L. Ed. 1416 (1945). "Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied, for the reason that application has been made prior to judgment of the Circuit Court of Appeals." At page 858.

See also *Robertson* and *Kirkham supra*, at page 235: "Although the authority to issue a certiorari to bring up a case pending in, and not yet decided by, the Court of Appeals has been in existence since 1891, writs are rarely issued in such cases, and indeed, are not frequently applied for."

IV.

THERE IS NO CONFLICT BETWEEN COURTS OF APPEALS ON THE QUESTION PRESENTED.

The petitioners sought to impress this court with an ostensible need that their application be granted because similar issues were presented in other then-pending petitions. However, as noted above those applications have, since the filing of the petition herein, all been denied. *United Railroad Operating Crafts v. Wyer,* in the Second Circuit, Petition No. 472; *United Railroad Operating Crafts v. Northern Pacific Railway Company,* in the Ninth Circuit, Petition No. 513; and *United Railroad Operating Crafts v. The Pennsylvania Railroad Company,* in the Seventh Circuit, Petition No. 548.

The fact that several applications for certiorari were previously pending did not, without more, prove anything more than that which has always been true in the multiplicity of suits commenced by United Railroad Operating Crafts—if U. R. O. C. was not national in scope, perhaps its attorneys were. For, in every case except one (*United Railroad Operating Crafts, et al., v. The Pennsylvania Railroad Company, et al.,* commenced in the United States District Court for the Northern District of Illinois, Eastern Division)[2], in which decision was had, the respective District Court, including the instant one, ruled that it was without jurisdiction of the subject matter, and that the controversy was properly and exclusively for the administrative agencies and procedures provided by the Railway

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[2] *U. R. O. C., et al. v. Pennsylvania Railroad Company,* U. S. D. C., N. D., Ill., E. Div., No. 52 C 1456, unreported, pending before U. S. Ct. of Appeals, 7th Cir., No. 10914, cert. den. U. S. S. Ct., Pet. No. 548, March 15, 1954.

Labor Act.[3] The rulings of the New York and Washington District Courts were affirmed on appeal by the Courts of Appeal of the Second and Ninth Circuits, respectively.[4] No other appellate court ruled otherwise. An Ohio ruling was not appealed.[5] In the Illinois case, *supra*, the District Court in taking jurisdiction ruled against the plaintiff's contentions on the merits, as did the National Railroad Adjustment Board, an administrative agency existing under the Railway Labor Act, which similarly ruled against the plaintiff's contentions, on the merits, in a case before it.[6]

The ultimate fact then becomes that there is no conflict between any of the circuits, and, except as indicated, there is no conflict at all. This is accordingly not an appropriate case for this Court to take jurisdiction.

V.

THE PETITIONERS ARE SEEKING TO RAISE HERE CONSTITUTIONAL ISSUES, AND OTHER MATTERS NOT BEFORE THE DISTRICT COURT.

In their petition, and in their presentation of the Questions Presented, petitioners constantly refer to matters not appropriately before the court. For example, there

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[3] *U R. O. C., et al. v. Wyer, et al.*, 115 F. Supp. 359, 205 F. (2d) 153 (U. S. D. C., S. D., N. Y., aff'd. Ct. App. (2d Cir.)), cert. den. U. S. S. Ct., Pet. No. 472, March 15, 1954; *U. R. O. C., et al. v. New York, New Haven and Hartford Railroad Company, et al.*, 205 F. (2d) 153 (U. S. D. C., S. D., N. Y., aff'd. Ct. App. (2d Cir.)), cert. den. U. S. S. Ct., March 15, 1954; *U. R. O. C., et al. v. Northern Pacific Railway Company et al.*, 208 F. (2d) 135 (U. S. D. C., W. D., Wash., aff'd. Ct. App. (9th Circ.)), cert. den., U. S. S. Ct., Pet. No. 513, March 15, 1954; *Lake, et al., v. Baltimore & Ohio Ry. Co.*, 31 L. R. R. M. 2656 (U. S. D. C., S. D., W. Div., Ohio, Civil No. 3049) (appl. dis. by stipulation).

[4] See footnote 3.

[5] See footnote 3.

[6] *Brotherhood of Locomotive Firemen and Enginemen v. Chi., B. & Q. R. Co.*, First Division, N. R. A. B., Docket No. 3074.

is a reference to alleged lack of due process before the system board, and under the processes of the Railway Labor Act. These issues are not encompassed by the pleadings, were not presented to the District Court, except in connection with a motion, after judgment, which was denied, asking leave to amend in order to raise constitutional issues and asking the impanelling of a three-judge court. While petitioners first acknowledge, with some emphasis, at pages 15 and 16 of their application, that "they do not seek review by this petition of the District Court's denial of leave to amend by adding a second count to the complaint," which second count concerned constitutional issues, they immediately ignore their self-imposed and conceded restriction of issues before this Court. Only constitutional issues raised below are before this Court on appeal. *Shelley v. Kraemer,* 334 U. S. 1, 8; *Duigan v. United States,* 274 U. S. 195, 200.

Moreover, petitioners contend that the instant cause should somehow, more than various of the other United Railroad Operating Crafts cases formerly pending on petition for certiorari, be taken for review. But the reason offered is that the System Board here sat, and "the Court will have before it, as part of the record (R. 107a-181a), the transcript of the hearing before the System Board of Adjustment." In the instant case, of course, a System Board hearing was held. Apart from the obvious, that whether the decision or transcript of the System Board is subject to review is *the* issue on appeal, so that argument by reference to it (the transcript) fully begs the issue, the transcript certainly is not a part of the record before this Court in connection with the instant petition, if indeed, it is even a part of the record before the Court of Appeals. For the fact is that the transcript of the System Board hearing was appended, as an exhibit, to plaintiffs' proposed amended complaint in the District Court,

which amendment the District Court denied. Petitioners concede that that denial is not here for review; obviously, then, it is improper for petitioners to argue in connection with this petition, and it would be improper to argue on review itself, by reference to pleadings and exhibits whose filing the District Court refused. Not merely is such argument improper here, but as we have previously pointed out, plaintiffs in referring to the transcript of the System Board, are alluding to portions of their "transcript of record" whose very inclusion in the record before the *Court of Appeals* is one of the issues before that court (because of questions of late entry of the District Court Order denying amendment, etc., and other questions not before this court).

VI.

THE DECISION OF THE DISTRICT COURT WAS CORRECT

The decision of the District Court is supported by the statutes and judicial authorities. Many other district courts, and the Courts of Appeal of the Second and Ninth Circuits, have, as above set forth, specifically passed upon the issues of this case in suits brought by the plaintiffs' union, and, with the single district court exception noted, agreed that the federal courts are without jurisdiction of the subject matter of this type of dispute.

As the District Court observed, the entire structure of the Railway Labor Act contemplates the administrative determination of questions arising under the Act. So, under the Act, the National Railroad Adjustment Board (or, alternatively, by agreement to that effect by the carrier and union, any system group, or regional board) is authorized *exclusively* to hear disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or

application of agreements concerning rates of pay, rules, or working conditions. *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors of America v. Southern Railway Co.*, 339 U. S. 255; *Order of Railway Conductors of America v. Pitney*, 326 U. S. 561. Moreover, awards of the National Railroad Adjustment Board, or by extension, of a system board, "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." 45 U. S. C. A., Section 153, First (m).[7]

As the District Court observed, "the union shop provision of an agreement, executed in conformance with the Act, concerns a rule or working condition governing the employment relationship, and dispute as to whether an employee should be discharged for failure to comply with such a provision of the agreement is a dispute between an employee and a carrier involving the interpretation and application of an agreement concerning a rule or working condition. The hearing of such a dispute, therefore, is within the exclusive province of the adjustment board."

Here, there was such a union shop provision, whose language almost exactly paralleled that of the 1951 Union Shop amendment to the Railway Labor Act. The validity of that union shop agreement has never been challenged (except, insofar as the agreement goes on to vest jurisdiction in a system board as to determination of the compliance question). The sole ultimate question therefore

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[7] As stated in *Missouri-Kansas-Texas R. Co. v. Brotherhood Ry. & S. S. Clerks*, 188 F. 2nd 302, 305:

> "There is no question now but that the courts have absolutely no jurisdiction to interpret agreements between carriers and their employees or to settle disputes arising out of the construction of such agreements. That principle has been so firmly established by a series of decisions construing Section 3 of the Railway Labor Act that we deem it unnecessary even to cite authorities."

is of the plaintiffs' compliance with that agreement. It is clear under the cited authorities that the district court was without initial or "appellate" jurisdiction, the question being one for the exclusive determination by the administrative agencies of the Railway Labor Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be denied.

Respectfully submitted,

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